

# Mandatory Arbitration Agreements of ADEA Claims: An Analysis of Their Validity Under the Older Workers Benefit Protection Act

AMY BLAIR

## I. INTRODUCTION

Controversy over mandatory arbitration has skyrocketed as the presence of pre-dispute arbitration agreements in employment contracts has become commonplace.<sup>1</sup> Employers no doubt prefer the efficiency—both in time and money—that arbitration can offer as compared to traditional litigation.<sup>2</sup> The confidentiality and finality that result from arbitration are also attractive considerations.<sup>3</sup> However, mandatory arbitration has been criticized in employment discrimination disputes as being biased against employees, particularly where the employers are “repeat players.”<sup>4</sup>

In light of the liberal federal policy favoring arbitration,<sup>5</sup> most courts continue to uphold mandatory arbitration agreements in employment

---

<sup>1</sup> See John-Paul Motley, *Compulsory Arbitration Agreements in Employment Contracts From Gardner-Denver to Austin: The Legal Uncertainty and Why Employers Should Choose Not To Use Preemployment Arbitration Agreements*, 51 VAND. L. REV. 687, 688 (1998).

<sup>2</sup> Robert S. McArthur, Comment, *Arbitrary Civil Rights?: The Case of Duffield v. Robertson Stephens*, 32 LOY. L.A. L. REV. 881, 883 (1999) (stating that “arbitration is an ‘advantageous vehicle’ for employers who wish to avoid the cost, inconvenience, and uncertainty of civil litigation.”). From 1990 to 1995, companies choosing ADR saved more than two million dollars over companies that chose litigation. *Id.* at 882 n.20.

<sup>3</sup> Motley, *supra* note 1, at 714.

<sup>4</sup> Carrie Menkel-Meadow, *Do the “Haves” Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 26 (1999) (recognizing that repeat players “are more able to mobilize legal and other resources to maximize long-term gain.”). Menkel-Meadow further emphasizes that mandatory arbitration “advantages employers, prevents full evidentiary presentations, avoids jury trials, and prevents the possibility of some kind of remedies . . . .” *Id.* at 39; see also Sarah Rudolph Cole, *A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining Alexander v. Gardner-Denver in the Wake of Gilmer v. Interstate/Johnson Lane Corp.*, 1997 BYU L. REV. 591, 619 (1997) (stating that repeat players have an obvious advantage over one-shot players who are unable to intelligently evaluate an arbitration clause due to a lack of experience and inadequate resources in weighing the pros and cons of dispute resolution mechanisms).

<sup>5</sup> Federal Arbitration Act, 9 U.S.C. §§ 1–16 (1994) (stating that the purpose is to make agreements to arbitrate enforceable to the same extent as other contracts).

contracts.<sup>6</sup> This trend, however, has met resistance when statutory rights are involved.<sup>7</sup> When an agreement to arbitrate is placed in an employment contract, it forces an individual either to sign the contract or to seek another profession.<sup>8</sup> This take-it-or-leave-it offer creates the risk that individuals will be manipulated into surrendering statutory rights.<sup>9</sup> This fear has raised concerns regarding the appropriateness of the mandatory arbitration of statutory claims.<sup>10</sup>

The Supreme Court addressed this issue in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>11</sup> In *Gilmer*, the Court held that statutory claims could be arbitrated pursuant to the Federal Arbitration Act (FAA).<sup>12</sup> Although the Court recognized that not all statutory claims would be appropriate for arbitration, it held that a party who has agreed to arbitrate should be held to such an agreement unless Congress specifically precludes a waiver of a judicial forum.<sup>13</sup>

This article addresses the controversy surrounding mandatory arbitration of employment disputes arising from allegations of age discrimination. The Age Discrimination in Employment Act (ADEA) expressly gives claimants a

---

<sup>6</sup> See discussion *infra* Part II, III.

<sup>7</sup> E.g., *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1202–03 (9th Cir. 1998) (finding that the Civil Rights Act of 1991 precludes compulsory arbitration of civil rights claims); *Thiele v. Merrill Lynch, Pierce, Fenner & Smith*, 59 F. Supp. 2d 1060, 1067 (S.D. Cal. 1999) (holding that the arbitration clause did not bar judicial resolution of the age discrimination claim).

<sup>8</sup> *Duffield*, 144 F.3d at 1199.

<sup>9</sup> Brief of the Equal Employment Opportunity Commission as Amicus Curiae at 3, *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999) (No. 98-1246).

<sup>10</sup> See EEOC *Policy Statement on Mandatory Arbitration*, Daily Lab. Rep. (BNA), NO. 133, at E-4 (July 11, 1997) (stating that “agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced in these laws” and are thus illegal and unenforceable); *National Academy of Arbitrators’ Statement and Guidelines*, Daily Lab. Rep. (BNA), NO. 103, at E-1 (May 29, 1997) (stating that it “opposes mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights.”).

Perhaps recognizing such criticisms and concerns, the National Association of Securities Dealers proposed a rule change to abolish mandatory arbitration of employment discrimination claims. The Securities Exchange Commission approved this change. The New York Stock Exchange has also proposed a similar rule change. *Rosenberg*, 170 F.3d at 7.

<sup>11</sup> 500 U.S. 20, 27 (1991).

<sup>12</sup> *Id.* at 26.

<sup>13</sup> *Id.*

## MANDATORY ARBITRATION AGREEMENTS

statutory right to a jury trial.<sup>14</sup> Thus, an individual who has a valid age discrimination claim against his employer has a guaranteed right to a judicial remedy, unless this right has been surrendered as a condition of employment. If an individual is not fully aware of his guaranteed rights under the ADEA when signing an employment contract that contains a mandatory arbitration clause, he unknowingly and involuntarily surrenders his right to a jury trial. In an attempt to prevent such a result, Congress enacted the Older Workers Benefit Protection Act (OWBPA) in 1990.<sup>15</sup> The OWBPA, which amended § 7 of the ADEA, was enacted to ensure that older workers are not misled into waiving their rights to seek legal relief under the ADEA.<sup>16</sup>

This note asserts that it was Congress' intent to preclude the waiver of a judicial remedy by amending the ADEA with the enactment of the OWBPA. Exploring the issue of congressional intent and the purpose of the OWBPA is particularly timely in light of the conflicting opinions issued by lower courts as to the validity of mandatory arbitration agreements when ADEA claims arise. Part II of this Note provides essential background information on the history and enforceability of mandatory arbitration agreements. It first examines the applicability of the FAA to mandatory arbitration agreements in employment contexts. Part II then discusses several Supreme Court decisions, including the *Gilmer* decision, that provide the backdrop necessary to understand the history of the enforceability of mandatory arbitration in employment contracts. Part III analyzes the pertinent language of the OWBPA as well as the purpose and legislative history behind its enactment. Part III also discusses several court opinions interpreting Congress' intent to preclude or uphold mandatory arbitration agreements. Part IV explores the scope of the OWBPA to determine whether Congress' concern was solely with exit incentive and group termination programs, or if mandatory arbitration agreements were also a consideration. Part V concludes that the OWBPA does in fact prohibit the waiver of a judicial remedy unless such waiver is knowing and voluntary.

---

<sup>14</sup> 29 U.S.C. § 626(c)(2) (1994).

<sup>15</sup> Pub. L. No. 101-433, 104 Stat. 978 – 84 (1990) (codified as amended at 29 U.S.C. 621, 623, 626, 630 (1994 & Supp. II 1997)).

<sup>16</sup> S. REP. NO. 101-263, at 5 (1990); H.R. REP. NO. 101-664, at 7 (1990).

## II. THE ENFORCEABILITY OF MANDATORY ARBITRATION AGREEMENTS IN EMPLOYMENT CONTEXTS

The Supreme Court first addressed the validity of mandatory arbitration agreements in *Alexander v. Gardner-Denver Co.*<sup>17</sup> In *Gardner-Denver*, the Court refused to compel arbitration of an employee's Title VII claim despite a mandatory arbitration provision in the collective bargaining agreement.<sup>18</sup> This presumption against the arbitrability of statutory claims continued well into the 1980s until the Supreme Court handed down a series of opinions recognizing that statutory claims could be the subject of an arbitration agreement.<sup>19</sup> The arbitrability of statutory claims was again affirmed in *Gilmer*, when the Supreme Court held that an employee was required to arbitrate his age discrimination claim pursuant to a mandatory arbitration agreement contained in a securities registration application.<sup>20</sup> To better understand the Supreme Court's reasoning behind the above-mentioned decisions, the Federal Arbitration Act of 1925, and the controversy surrounding it, must be examined.

### A. Applicability of the Federal Arbitration Act

Decisions that statutory claims can be the subject of arbitration agreements appear to be the result of a federal policy favoring arbitration.<sup>21</sup> Such policy stems from the Federal Arbitration Act of 1925 (FAA).<sup>22</sup> Congress enacted the FAA to ensure that agreements to arbitrate were enforceable to the same extent as other contracts.<sup>23</sup> However, the FAA

---

<sup>17</sup> 415 U.S. 36 (1974).

<sup>18</sup> *Id.* at 47–51.

<sup>19</sup> *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 241–42 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985).

<sup>20</sup> *Gilmer*, 500 U.S. 20, 35 (1991).

<sup>21</sup> *Id.* at 26 (stating “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.” (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983))).

<sup>22</sup> 9 U.S.C. §§ 1–16 (1994).

<sup>23</sup> See *supra* note 5 and accompanying text; see also *Gilmer*, 500 U.S. at 24 (observing that the FAA’s purpose “was to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts.” (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219–20 (1985))).

## MANDATORY ARBITRATION AGREEMENTS

applies only to contracts that involve commerce.<sup>24</sup> Although seemingly broad in its coverage, § 1 of the FAA provides for several exclusions that may prove problematic for mandatory arbitration agreements in employment contracts.<sup>25</sup> Section 1 provides that “[n]othing herein contained shall apply to contracts of employment of seamen, railroad employees, *or any other class of workers engaged in foreign or interstate commerce.*”<sup>26</sup> If construed broadly, the language indicates that the FAA does not apply to any employment contract.<sup>27</sup> If construed narrowly, the FAA applies to all employment contracts except those involving employees who actually transport people or goods in interstate commerce.<sup>28</sup>

An overwhelming majority of circuit courts have construed the exclusionary language of § 1 narrowly.<sup>29</sup> However, the Ninth Circuit has adopted a broad interpretation of § 1 and has excluded all employment contracts from FAA coverage.<sup>30</sup> The Supreme Court has not yet decided the scope of the FAA in the context of employment contracts.<sup>31</sup> Thus, the FAA,

---

<sup>24</sup> 9 U.S.C. § 2. The pertinent part of § 2 provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

*Id.* The Supreme Court has held that a contract involves commerce within the meaning of the FAA when fulfillment of the contract duties requires the employee to work in commerce, produce goods for commerce, or engage in activities that *affect* commerce. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 276–77 (1995) (citing *Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198, 200–01 (1956)).

<sup>25</sup> 9 U.S.C. § 1.

<sup>26</sup> *Id.* (emphasis added).

<sup>27</sup> *Motley*, *supra* note 1, at 691.

<sup>28</sup> *Id.*

<sup>29</sup> *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998); *Penny v. United Parcel Serv.*, 128 F.3d 408, 412 (6th Cir. 1997); *O’Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 227 (3d Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 357 (7th Cir. 1997); *Cole v. Burns Int’l. Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971).

<sup>30</sup> *E.g.*, *Craft v. Campbell Soup Co.*, 161 F.3d 1199, 1202 (9th Cir. 1998).

<sup>31</sup> The U.S. Supreme Court granted certiorari on this issue on May 22, 2000. *Circuit City Stores, Inc. v. Adams*, 120 S. Ct. 2004 (2000). In the petition for writ of certiorari, the Court was asked to review the 9th Circuit’s conclusion that the FAA does not apply

as interpreted today, extends statutory protection to most mandatory arbitration agreements in the employment arena.

Aware of this federal policy favoring arbitration, employers have seized the opportunity to include mandatory arbitration provisions in employment contracts.<sup>32</sup> Such provisions commonly state that the individual agrees to arbitrate any dispute, claim, or controversy arising out of the employment relationship.<sup>33</sup> When the term is included in an employment contract, an individual is faced with one of two choices: sign the contract, thus waiving important procedural and remedial protections, or find alternative employment.<sup>34</sup> Because mandatory arbitration agreements are generally signed before a dispute even exists,<sup>35</sup> the majority of individuals in need of a job will have little choice but to agree to such provisions.

The current interpretation of the FAA extends statutory protection to mandatory arbitration agreements in employment contracts and upholds their validity despite the unequal bargaining power that is present. Not only does this result appear at odds with the language and congressional intent of the FAA,<sup>36</sup> but it also cannot be reconciled with Congress' subsequent efforts to

---

to labor or employment contracts. *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070, 1070 (9th Cir. 1999). The *Circuit City* decision was supported by the 9th Circuit's holding in *Craft v. Campbell Soup Co.* See *supra* note 30.

<sup>32</sup> See *Motley*, *supra* note 1.

<sup>33</sup> *Gilmer*, 500 U.S. 20, 23 (1991).

<sup>34</sup> *Duffield*, 144 F.3d 1182, 1199 (9th Cir. 1998).

<sup>35</sup> H.R. REP. NO. 101-664, at 23. The Committee on Education and Labor stated:

The preemptive waiver of rights occurs before a dispute has arisen and indeed before an employee is even aware of any potential or actual pattern of discrimination. Such a preemptive waiver also may preclude the employee from asserting claims that arise out of subsequent discriminatory conduct by the employer, e.g., hiring younger workers to replace the terminated older workers.

These waivers are both unfair and inconsistent with the intent of the ADEA.

*Id.*; see also *Cole*, *supra* note 4, at 620 (suggesting that a preemptive waiver of rights is fundamentally unfair because employees suffer from judgmental bias, which causes them to "systematically ignore or de-emphasize the likelihood that a low probability event will affect them because the event has not occurred in the past." Thus, employees misapprehend the risk that they will later engage in litigation with their employer.).

<sup>36</sup> See 9 U.S.C. § 1; see also *Gilmer*, 500 U.S. at 39 (illustrating the FAA's purpose, the chairman of the committee responsible for drafting the FAA assured the Senators that the bill "is not intended [to] be an act referring to labor disputes, at all." (citing *Hearing on S.4213 and S.4214 before a Subcommittee of the Senate Committee on the Judiciary*, 67th Cong. 9 (1923))); Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 468 (1996) (stating "[a]t the time the FAA was

## MANDATORY ARBITRATION AGREEMENTS

protect employees and to restore equality of bargaining power between employers and employees.<sup>37</sup> It offends public policy<sup>38</sup> and disregards congressional intent<sup>39</sup> to extend the FAA to mandatory arbitration agreements that were entered into solely as a condition of employment. In light of these considerations, the Ninth Circuit's broad construction of § 1 appears correct.<sup>40</sup>

### B. *The Validity of Mandatory Arbitration Agreements: A Look at Supreme Court Precedent*

Despite the FAA's pro-arbitration mandate, the Supreme Court initially refused to compel arbitration of statutory claims.<sup>41</sup> In *Gardner-Denver*, Harrell Alexander filed a complaint with the Steelworker's Union alleging racial discrimination by the defendant company.<sup>42</sup> The collective bargaining agreement contained a mandatory arbitration provision that subjected his claim to binding arbitration.<sup>43</sup> Although Alexander filed a discrimination

---

passed, the language was intended to exclude contracts of employment from its purview.").

<sup>37</sup> Brief Amici Curiae of the National Employment Lawyers Association et al. in support of petitioner at 9–11, *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998) (No. 97-889). The National Employment Lawyers Association (NELA) supports a broad interpretation of the FAA's scope by referring to the policy reasons underlying the National Labor Relations Act (NLRA). Congress noted that the NLRA was necessary because of "[t]he inequality of bargaining power between employees . . . and employers . . ." *Id.* at 9 n.18 (citing 29 U.S.C. § 151 (1994)).

<sup>38</sup> See Michele L. Giovagnoli, Comment, *To Be or Not to Be?: Recent Resistance to Mandatory Arbitration Agreements in the Employment Arena*, 64 UMKC L. REV. 547, 562 (1996) (suggesting that mandatory arbitration agreements are a type of an adhesion contract entered into as a result of the unequal bargaining power between employers and employees); see also Gina K. Janeiro, *Balancing Efficiency and Justice in Support of the Equal Opportunity Commission's Policy Statement Regarding Mandatory Arbitration and Employment Contracts*, 7 AM. U. J. GENDER SOC. POL'Y & L. 125, 141 (1999) (stating that "arbitration provides structural advantages only for the employer. . . . This makes it less likely that the employee understands how to make informed decisions regarding the selection of an arbitrator, or what is involved in arbitrating a dispute.").

<sup>39</sup> See *supra* note 37 and accompanying text.

<sup>40</sup> See *Gilmer*, 500 U.S. at 40 (Stevens, J., dissenting) (stating "[t]he exclusion in § 1 should be interpreted to cover any agreements by the employee to arbitrate disputes . . . particularly where such agreements to arbitrate are conditions of employment.").

<sup>41</sup> *Gardner-Denver*, 415 U.S. 36, 59–60 (1974).

<sup>42</sup> *Id.* at 42.

<sup>43</sup> *Id.* at 40–42.

complaint with the EEOC,<sup>44</sup> the arbitrator found that he had been discharged for just cause and, as a result, the EEOC dismissed his claim.<sup>45</sup> Subsequently, Alexander brought suit in federal court, alleging a violation of Title VII.<sup>46</sup> The Supreme Court held that the mandatory arbitration agreement would not preclude Alexander's statutory right to trial under Title VII.<sup>47</sup> After analyzing Title VII, the Court concluded that "[t]he purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal."<sup>48</sup>

The presumption against the arbitrability of statutory claims survived for many years until the Supreme Court's decisions in what is known as the *Mitsubishi* trilogy.<sup>49</sup> In all three cases, the Court recognized that statutory claims could be the subject of arbitration agreements. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>50</sup> the Court compelled the arbitration of antitrust claims.<sup>51</sup> The Court held that a party who makes a contract to arbitrate "should be held to it unless Congress . . . has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."<sup>52</sup> The Court continued to adhere to this reasoning in the final two decisions of

---

<sup>44</sup> *Id.* at 42.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 43. Title VII provides:

It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

<sup>42</sup> U.S.C. § 2000e-2(a) (1994).

<sup>47</sup> *Id.* at 47.

<sup>48</sup> *Id.* at 56.

It should be noted that the *Gardner-Denver* decision involved a unionized employee who agreed to submit his claim to arbitration pursuant to a collective bargaining agreement. In contrast, the *Gilmer* decision upholding the arbitrability of statutory claims involved a non-unionized employee. See generally Cole, *supra* note 4 for a thorough discussion of both cases and why *Gardner-Denver* should be reevaluated in light of the *Gilmer* decision; see also Cole v. Burns Int'l Sec. Serv. for a discussion of why mandatory arbitration in the collective bargaining context presents concerns. 105 F.3d 1465, 1473–79 (D.C. Cir. 1997).

<sup>49</sup> Motley, *supra* note 1, at 695. See also McArthur, *supra* note 2, at 890.

<sup>50</sup> 473 U.S. 614 (1985).

<sup>51</sup> *Id.* at 640.

<sup>52</sup> *Id.* at 628.



## MANDATORY ARBITRATION AGREEMENTS

the trilogy. In *Shearson/American Express, Inc. v. McMahon*,<sup>53</sup> the Court enforced an arbitration agreement brought pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>54</sup> And finally, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*,<sup>55</sup> the Court found statutory securities claims to be arbitrable under the FAA.<sup>56</sup>

The presumption against the arbitrability of statutory claims was defeated by the Mitsubishi trilogy and the FAA found new life, giving rise to the federal policy favoring arbitration. In 1991, the Court went a step further and extended the enforcement of mandatory arbitration into the realm of civil rights.<sup>57</sup> In *Gilmer*, the Court held that a non-unionized employee could be compelled to arbitrate a discrimination claim pursuant to a mandatory arbitration agreement in a securities registration application.<sup>58</sup> Robert Gilmer worked as a manager of financial services for the defendant company and, as a condition of employment, was required to register as a securities representative.<sup>59</sup> This application contained a mandatory arbitration agreement, which provided that Gilmer would arbitrate any dispute, claim, or controversy arising out of his employment relationship with Interstate.<sup>60</sup> After six years of service and, at the age of 62, Gilmer was terminated.<sup>61</sup> This case arose after Gilmer brought suit in federal court alleging age discrimination.<sup>62</sup> Interstate filed a motion to compel arbitration, which was denied by the district court.<sup>63</sup> The Fourth Circuit reversed this decision stating there was no indication of a congressional intent to preclude mandatory arbitration agreements.<sup>64</sup> The Supreme Court granted certiorari and subsequently affirmed the Fourth Circuit's holding.<sup>65</sup> The Court found

---

<sup>53</sup> 482 U.S. 220 (1987).

<sup>54</sup> *Id.* at 242.

<sup>55</sup> 490 U.S. 477 (1989).

<sup>56</sup> *Id.* at 485–86.

<sup>57</sup> *See Gilmer*, 500 U.S. 27, 35 (1991).

<sup>58</sup> *Id.* at 23.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 24. To reach this decision, the court relied on the Supreme Court's decision in *Gardner-Denver*, which held that Congress had intended to protect against the waiver of a judicial forum. *Gardner-Denver*, 415 U.S. 36 (1974).

<sup>64</sup> *Gilmer*, 500 U.S. at 24.

<sup>65</sup> *Id.* at 23. The Court stated that it did not agree that the enforcement of arbitration agreements would be inconsistent with the purpose or intent behind the ADEA. *Id.* at 27.

that Congress had not communicated an intent to preclude the waiver of ADEA claimants' statutory right to trial.<sup>66</sup>

As a result of the Supreme Court's decision in *Gilmer*, the presumption against the arbitrability of statutory claims has been largely destroyed. Although *Gilmer* dealt solely with an ADEA claim, courts have routinely applied the holding to a number of other federal statutes, including claims brought under Title VII,<sup>67</sup> the Americans with Disabilities Act (ADA)<sup>68</sup> and the Employee Retirement Income Security Act (ERISA),<sup>69</sup> among others. However, Congress has made several attempts to limit the use of mandatory arbitration clauses in employment contracts.<sup>70</sup> One such attempt to protect an ADEA claimant's rights was Congress' enactment of the OWBPA. However, when deciding *Gilmer*, the Court did not fully address the OWBPA and its potential effect on the validity of mandatory arbitration agreements of ADEA claims.<sup>71</sup> Because *Gilmer*'s agreement to arbitrate was

---

<sup>66</sup> *Id.* at 26–27. The Court observed that if an intention to preclude waivers of a judicial forum existed, it would be “discoverable in the text of the ADEA, its legislative history, or an ‘inherent conflict’ between arbitration and the ADEA’s underlying purposes.” *Id.*

<sup>67</sup> *E.g.*, *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1486–87 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 700 (11th Cir. 1992); *Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 935 (9th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 307 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991).

<sup>68</sup> *E.g.*, *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 73–78 (1998).

<sup>69</sup> *E.g.*, *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1117–18 (3d Cir. 1993); *see also Kramer v. Smith Barney*, 80 F.3d 1080, 1084 (5th Cir. 1996) (supporting the proposition that ERISA claims are arbitrable).

<sup>70</sup> Brian K. Van Engen, *Post-Gilmer Developments in Mandatory Arbitration: The Expansion of Mandatory Arbitration for Statutory Claims and the Congressional Effort to Reverse the Trend*, 21 J. CORP. L. 391, 410–11 (1996) (discussing several congressional bills, such as the Protection from Coercive Employment Agreements Act and the Civil Rights Procedures Protection Act, that have been introduced to limit the use of mandatory arbitration agreements). The Protection from Coercive Employment Agreements Act was proposed to amend Title VII of the Civil Rights Act of 1964, the ADEA, and the ADA, among others, to make it illegal to condition employment on agreements to arbitrate. *Id.* The Civil Rights Procedures Protection Act was proposed to amend Title VII, the ADEA, the ADA, and the FAA, among others, to make mandatory arbitration agreements unenforceable with regards to claims arising under the above statutes. *Id.*

<sup>71</sup> Congress amended the ADEA on October 16, 1990 by enacting the OWBPA. This was *after* the Supreme Court granted certiorari in *Gilmer*. *Duffield*, 144 F.3d 1182, 1190 n.5 (9th Cir. 1998).

## MANDATORY ARBITRATION AGREEMENTS

signed in 1981,<sup>72</sup> and his ADEA claim arose in 1987,<sup>73</sup> the OWBPA would not have applied<sup>74</sup> and thus its applicability to mandatory arbitration agreements was not before the Supreme Court.<sup>75</sup> Nonetheless, the *Gilmer* Court did acknowledge the OWBPA's existence in one footnote and in a few sentences in the subsequent text.<sup>76</sup> The Court then concluded, without any discussion of the OWBPA's purpose or legislative history, that Congress "did not explicitly preclude arbitration or other non-judicial resolution of claims, even in its most recent amendments to the ADEA."<sup>77</sup>

At most, this conclusion is dicta. The issue of whether the OWBPA precludes the waiver of statutory rights guaranteed under the ADEA was not properly before the Court. Although in existence at the time the *Gilmer* decision was handed down, the OWBPA did not apply to *Gilmer*'s claims. Had the Court desired to interpret the OWBPA in respect to mandatory arbitration agreements in order to resolve all controversies, it should have taken the proper steps in doing so. Instead, the Court chose to articulate a blind conclusion. Without even so much as discussing the plain meaning of the OWBPA's statutory language, the Court concluded that there was no congressional intent to preclude the waiver of a judicial forum for ADEA claimants.<sup>78</sup> As such, the *Gilmer* decision has little precedential value to address the effect of the OWBPA on the enforceability of mandatory arbitration agreements.<sup>79</sup>

---

<sup>72</sup> *Gilmer*, 500 U.S. 20, 23 (1991).

<sup>73</sup> *Id.*

<sup>74</sup> Pub. L. No. 101-433 § 202, which states: "[t]he amendment made by section 201 shall not apply with respect to waivers that occur before the date of enactment of this Act."

<sup>75</sup> *Duffield*, 144 F.3d at 1190 n.5 (stating the Supreme Court did not consider the newly enacted OWBPA in *Gilmer*).

<sup>76</sup> *Gilmer*, 500 U.S. at 29 & n.3.

<sup>77</sup> *Id.* at 29; see also Brief of the Equal Employment Opportunity Commission as Amicus Curiae at 13, *Rosenberg* (No. 98-1246) (arguing that in *Gilmer*, "the Court carefully assessed whether compelling arbitration of *Gilmer*'s ADEA claim was inconsistent with the purpose of the pre-OWBPA ADEA. It offered no analysis, however, of the text, [legislative] history, or purpose of the OWBPA amendments, which had just been enacted by Congress . . .").

<sup>78</sup> *Id.* at 29.

<sup>79</sup> *Duffield*, 144 F.3d at 1190 n.5 (concluding that because the OWBPA was not considered in *Gilmer*, "current ADEA claims may require different treatment."); see also Brief of the Equal Employment Opportunity Commission as Amicus Curiae at 13, *Rosenberg* (No. 98-1246) (stating "[t]he conclusion is inescapable that the possible impact of the OWBPA on the enforceability of pre-dispute arbitration agreements was left open in *Gilmer*").

## III. STARTING ANEW: THE OWBPA AND CONGRESSIONAL INTENT

In 1967, Congress enacted the ADEA to prohibit arbitrary age discrimination of older workers in the workplace.<sup>80</sup> Congress provided a statutory right to a jury trial for those individuals discriminated against based on age rather than ability.<sup>81</sup> Today, it appears that employers have successfully circumvented this statutory right to a jury trial through the inclusion of mandatory arbitration provisions in employment contracts. Recognizing that the growing use of mandatory arbitration agreements in employment contracts was both unfair and inconsistent with the intent of the ADEA,<sup>82</sup> Congress determined legislative action was needed. On October 16, 1990, Congress enacted the OWBPA, which sets forth minimum standards for the waiver of rights under the ADEA.<sup>83</sup> More specifically, 29 U.S.C. § 626(f)(1) provides that “[a]n individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary.”<sup>84</sup> The ultimate question the courts have grappled with is exactly what “rights” does the OWBPA refer to? The determination of this question is essential in order

---

<sup>80</sup> *Gilmer*, 500 U.S. at 27 (citing 29 U.S.C. § 623(a)(1) (1994)). Section 623(a)(1) provides: It shall be unlawful for an employer “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.”

<sup>81</sup> 29 U.S.C. § 626(c)(2)(1994).

<sup>82</sup> See *supra* note 35, and accompanying text; see also *Gilmer*, 500 U.S. at 41 (Stevens, J., dissenting) (holding that “compulsory arbitration conflicts with the congressional purpose animating the ADEA . . .”). In his dissent, Justice Stevens notes that the ADEA authorizes the courts to grant broad injunctive relief in order to eliminate age discrimination in the workplace. He stated that commercial arbitration does not provide for class-wide injunctive relief and thus an essential purpose of the ADEA is frustrated. See *id.* at 41–42.

<sup>83</sup> S. REP. NO. 101-263, at 15 (1990).

<sup>84</sup> *Id.* at 6. To be a knowing and voluntary waiver, the following requirements must be satisfied:

- (1) the waiver is part of a written agreement; (2) the agreement makes specific reference to rights and claims under the ADEA; (3) the waiver does not apply to rights or claims that may arise after the date of the agreement itself; (4) the waiver is exchanged for valuable consideration in addition to what the individual already is entitled to receive; (5) the individual is given a reasonable time period in which to review and consider the agreement; and (6) the individual is advised in writing to consult with an attorney.

*Id.* Additional requirements are mandated in connection with an exit incentive or group termination program. *Id.*

to conclude whether or not Congress intended to preclude the waiver of a judicial forum.

### A. *The Domain of Protected Rights*

Two interpretations have emerged concerning the rights intended to be precluded from waiver under the OWBPA. One interpretation suggests that “the OWBPA protects against the waiver of a right or claim, not against the waiver of a judicial forum.”<sup>85</sup> The other interpretation suggests that the OWBPA protects procedural rights as well as substantive rights and thus precludes the waiver of a judicial forum unless such waiver is knowing and voluntary.<sup>86</sup> Each interpretation must be viewed in light of the OWBPA’s purpose and legislative history.

#### 1. *The OWBPA Cannot Be Interpreted to Protect Only Substantive Rights*

As modified by the OWBPA, the ADEA provides that a claimant “may not waive any right or claim under this chapter unless the waiver is knowing and voluntary.”<sup>87</sup> There are conflicting interpretations among the circuits and lower federal courts as to what constitutes a right.<sup>88</sup> This issue was addressed in the recent *Rosenberg* decision.<sup>89</sup> In *Rosenberg*, the plaintiff was

---

<sup>85</sup> *E.g.*, *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 660 (5th Cir. 1995).

<sup>86</sup> *E.g.*, *Thiele v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 59 F. Supp. 2d 1060, 1064–65 (S.D. Cal. 1999).

<sup>87</sup> 29 U.S.C. § 626(f)(1)(1994).

<sup>88</sup> Compare *Rosenberg*, 170 F.3d at 13 (holding “[t]o interpret the OWBPA’s reference to ‘right’ to include procedural rights—and the right to a judicial forum in particular— would be to ignore the Supreme Court’s repeated statements that arbitral and judicial fora are both able to give effect to the policies that underlie legislation.”), and *Williams*, 56 F.3d at 660 (stating “the OWBPA protects against the waiver of a right or claim, not against the waiver of a judicial forum.”), and *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 182 (3d Cir. 1998) (observing “the Supreme Court did not interpret the OWBPA’s reference to ‘any right or claim’ as encompassing procedural rights such as the right to a judicial forum.”), with *Thiele*, 59 F. Supp. 2d at 1064 (concluding “section 626(f)(1) is not ambiguous about the domain of protected rights because it defines that domain as all rights conveyed by the ADEA.”), and *Duffield*, 144 F.3d at 1190 n.5 (stating “Congress amended the ADEA to provide that all waivers of rights under the Act, apparently including the right to a jury trial, must be ‘knowing and voluntary.’”) (citation omitted).

<sup>89</sup> *Rosenberg*, 170 F.3d at 12–14.

hired by the defendant as a trainee financial consultant.<sup>90</sup> As a condition of employment, the plaintiff was required to sign the U-4 Form, a standard securities industry form, which bound her to arbitrate certain claims<sup>91</sup> after being hired. The plaintiff was later terminated and brought suit against her employer for age and gender discrimination, among other claims.<sup>92</sup> The employer sought an order to compel arbitration pursuant to the signed agreement.<sup>93</sup> The district court declined to compel the arbitration<sup>94</sup> and the First Circuit affirmed, although limiting its holding to the facts of this particular case.<sup>95</sup>

Although arbitration was not compelled, the court proceeded to analyze whether the OWBPA was enacted to preclude pre-dispute arbitration agreements.<sup>96</sup> Rosenberg and the EEOC as amici argued that the OWBPA's reference to "right" should be interpreted to include the statutory right to a jury trial on ADEA claims.<sup>97</sup> The First Circuit disagreed, declining to define a "right" as including the right to a judicial forum.<sup>98</sup> The court held that defining a "right" as including the right to a judicial forum would ignore Supreme Court precedent that both arbitral and judicial fora are equally able to give effect to the policies underlying the ADEA.<sup>99</sup> Thus, concluding that the OWBPA does not protect against the waiver of a judicial forum, the *Rosenberg* Court held that Congress did not intend to preclude mandatory arbitration agreements.<sup>100</sup>

---

<sup>90</sup> *Id.* at 3.

<sup>91</sup> *Id.* It is essential to note that the U-4 Form did not identify which claims were to be arbitrated. The form simply referred to the rules of the organizations with which plaintiff was registering. *Id.*

<sup>92</sup> *Id.* at 4.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Rosenberg*, 170 F.3d at 1. The court stated that the decision in this case must be limited to its facts. It clarified that "had Merrill Lynch taken the modest effort required to make relevant information regarding the arbitrability of employment disputes available to Rosenberg . . . it would have been able to compel Rosenberg to arbitration." *Id.* at 21.

<sup>96</sup> *Id.* at 12.

<sup>97</sup> *Id.* As amici, the EEOC states that the protection of an ADEA claimant's right to a jury trial was Congress' top priority. This conclusion is drawn from S. REP. No. 101-79, at 12-13 (1990) ("listing the loss of this right as the principal justification for adopting a limitation on the waiver of ADEA rights."); see also H.R. REP. No. 101-664, at 24 (1990); Brief of the Equal Employment Opportunity Commission as Amicus Curiae at 17, *Rosenberg* (No. 98-1246).

<sup>98</sup> *Rosenberg*, 170 F.3d at 13.

<sup>99</sup> *Id.* (citing *Gilmer*, 500 U.S. 20, 26 (1991)).

<sup>100</sup> *Rosenberg*, 170 F.3d at 13.

The *Rosenberg* Court, as well as several others, fell for the *Gilmer* trap. The reasoning behind the *Rosenberg* decision is based on the pre-OWBPA ADEA analysis articulated in *Gilmer*. As stated previously, the *Gilmer* decision holds very little, if any, precedential value for courts in the post-OWBPA era. Courts must resist the temptation to rely on the *Gilmer* reasoning and begin to apply the OWBPA the way in which Congress intended.<sup>101</sup> It is a well-known canon of statutory construction that when interpreting the language of a statute, a court must look to the provisions of the whole law and to its object and policy rather than focusing on a single sentence or member of a sentence.<sup>102</sup> In light of the OWBPA's purpose,<sup>103</sup> it can be concluded that Congress did intend to protect the procedural as well as the substantive rights guaranteed by the ADEA.

## 2. The OWBPA Protects Both Substantive and Procedural Rights

The ADEA expressly gives claimants a statutory right to a jury trial.<sup>104</sup> Employers, in an attempt to avoid litigation,<sup>105</sup> have increasingly dodged their employees' statutory rights by including mandatory arbitration agreements in employment contracts.<sup>106</sup> These agreements increase the risk that older workers will be coerced or manipulated into signing away their ADEA protections.<sup>107</sup> This unjust result is exactly what the OWBPA was designed to cure.<sup>108</sup> Section 626(f)(1) of the ADEA, as amended by the OWBPA, provides that "[a]n individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary." The Supreme

---

<sup>101</sup> See S. REP. NO. 101-263, at 5 (1990); H.R. REP. NO. 101-664, at 7 (1990) (stating the OWBPA was passed to ensure that "older workers are not coerced or manipulated" into waiving their rights to seek legal relief under the ADEA).

<sup>102</sup> *Duffield*, 144 F.3d at 1193 (citing *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95 (1993)).

<sup>103</sup> See *supra* note 101 and accompanying text.

<sup>104</sup> 29 U.S.C. § 626(c)(2)(1994).

<sup>105</sup> *Development in the Law—Employment Discrimination*, 109 HARV. L. REV. 1670, 1673 (1996) [hereinafter *Development in the Law*] (stating that employers might prefer arbitration to traditional litigation for "predictability, minimal appealability of awards, limited discovery . . . and increased confidentiality.").

<sup>106</sup> See *Motley*, *supra* note 1.

<sup>107</sup> See H.R. REP. NO. 101-664 at 20 (1990) (recognizing "[t]here will always be employees who feel that if they do not sign a waiver they will . . . be out of a job . . ."). See also Brief of the Equal Employment Opportunity Commission as Amicus Curiae at 3, *Rosenberg* (No. 98-1246) (stating "[m]any individuals will have no realistic choice but to sign such an agreement.").

<sup>108</sup> See *supra* note 101 and accompanying text.

Court has held that “[a court’s] task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.”<sup>109</sup> Congress enacted the OWBPA to ensure older workers were not coerced or manipulated into surrendering their right to seek legal relief under the ADEA.<sup>110</sup> The statutory language is consistent with this purpose in that it precludes the waiver of *any right* under the ADEA unless such waiver is knowing and voluntary.<sup>111</sup> The language is clear—Congress intended to preclude the waiver of a judicial forum absent a knowing and voluntary decision to do so.

This conclusion was recently articulated in *Thiele v. Merrill Lynch, Pierce, Fenner & Smith*.<sup>112</sup> In *Thiele*, the plaintiff was employed as a financial consultant for defendant from 1972 until 1996.<sup>113</sup> As a condition of employment, the plaintiff was required to register as a securities representative with the New York Stock Exchange.<sup>114</sup> This form contained a compulsory arbitration clause.<sup>115</sup> On at least four additional occasions, the last occurring July 25, 1995, the plaintiff executed a U-4 Form, once again agreeing to mandatory arbitration of any dispute, claim, or controversy.<sup>116</sup> The plaintiff was terminated and subsequently filed a claim with the court alleging, among other things, age discrimination.<sup>117</sup> The court granted the motion to compel arbitration but the plaintiff moved for reconsideration of the order.<sup>118</sup>

Upon reconsideration, the *Thiele* Court found that it had committed an error in compelling arbitration without scrutinizing the agreement to ensure it met the minimum standards for waiver of ADEA rights under the OWBPA.<sup>119</sup> Applying the OWBPA’s requirements, the court found that plaintiff’s 1995 U-4 Form arbitration clause did not contain a knowing and voluntary waiver of the plaintiff’s right to a jury trial, and was therefore unenforceable under the OWBPA.<sup>120</sup> In reaching its conclusion, the *Thiele*

---

<sup>109</sup> *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993).

<sup>110</sup> See *supra* note 101 and accompanying text.

<sup>111</sup> 29 U.S.C. § 626(f)(1)(1994).

<sup>112</sup> 59 F. Supp. 2d 1060, 1064 (S.D. Cal. 1999).

<sup>113</sup> *Id.* at 1061.

<sup>114</sup> See *id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1062.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 1063.

<sup>120</sup> *Id.* at 1067. The court entertained defendant’s argument that plaintiff’s waivers were executed prior to the OWBPA’s effective date, and thus the OWBPA was



## MANDATORY ARBITRATION AGREEMENTS

Court determined that § 626(f)(1) is unambiguous as to protected rights because it extends to all rights conveyed by the ADEA.<sup>121</sup>

According to its plain meaning, the OWBPA precludes the waiver of an ADEA claimant's statutory right to a jury trial unless the waiver is knowing and voluntary. In addition to a clear congressional intent to preclude unknowing and involuntary waivers of protected rights, the OWBPA's legislative history provides further insight.<sup>122</sup> In opposing the enactment of the OWBPA, the minority members of the Senate Labor and Human Resources Committee argued that the OWBPA would promote litigation rather than the informal resolution of potential and actual disputes.<sup>123</sup> Because these members believed it was necessary to preserve rather than limit the availability of forums to settle disputes,<sup>124</sup> they declined to join the majority in enacting the OWBPA.

Both the plain meaning and the legislative history of the OWBPA evince Congress' intent to preclude the waiver of a judicial forum. Had the *Gilmer* Court properly considered the OWBPA, it would have discovered that Congress' intent to preclude waivers of a judicial forum for ADEA claims was in fact discoverable in the text of the ADEA, as amended, and the

---

inapplicable. The court concluded, however, that at least two securities forms were executed after 1990 and these superceded his previous waivers. *Id.* at 1063-64.

<sup>121</sup> *Id.* at 1064. The court further supports their plain meaning interpretation by examining the OWBPA's legislative history. The OWBPA was enacted to ensure that older worker's rights to seek *legal relief* were protected. In asserting that the right to legal relief is equated with the right to a jury trial, the *Thiele* Court relied on the Supreme Court's holding in *Lorillard v. Pons*, 434 U.S. 575 (1978), which states "[i]n cases in which legal relief is available and legal rights are determined, the Seventh Amendment provides a right to [a] jury trial . . . . [B]y providing specifically for 'legal' relief, Congress knew the significance of the term 'legal,' and intended that there would be a jury trial on demand . . . ." *Thiele*, 59 F.Supp. at 1065 (quoting *Lorillard*, 434 U.S. at 583)). In the OWBPA's legislative history, Congress states that "[t]he language of the Supreme Court's *Lorillard* decision is both unequivocal and highly instructive." H.R. REP. NO. 101-664, at 18 (1990).

<sup>122</sup> The Supreme Court has consistently held that when examining legislative history, Congress' intent is best found in the Committee Reports on the bill, which "represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation." *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)).

<sup>123</sup> S. REP. NO. 101-263, at 59 (1990). The minority members also expressed a concern that the OWBPA would do more harm than good. They state "[t]his title may not harm an employee with the resources, time and inclination to pursue a claim through a formal administrative or judicial process. It *will* however, harm the employee who is unwilling or unable to pursue litigation for any number of reasons . . . ." *Id.*

<sup>124</sup> *Id.* at 59.

OWBPA's legislative history.<sup>125</sup> The determination of congressional intent behind the OWBPA has serious implications for mandatory arbitration agreements in employment contracts. Unless such agreements are knowing and voluntary, their validity should not be upheld under § 626(f)(1) of the ADEA. The question becomes whether mandatory arbitration agreements can ever be truly knowing and voluntary when they are conditions of employment.

### *B. The Knowing and Voluntary Requirements Under the OWBPA*

The ADEA, as amended by the OWBPA, provides that claimants may not waive any right or claim unless such waiver is "knowing and voluntary."<sup>126</sup> Waivers of rights protected under the ADEA must meet certain threshold requirements<sup>127</sup> to be valid and enforceable—namely, all waivers must be shown to have been knowing and voluntary.<sup>128</sup> To satisfy these requirements, legislative history indicates that "[a]t a minimum, the waiving party must have genuinely intended to release ADEA claims and must have understood that he was accomplishing this goal. The individual also must have acted in the absence of fraud, duress, coercion, or mistake of material fact."<sup>129</sup> The courts have a responsibility to scrutinize the knowing and voluntary requirements of any waiver of an ADEA claimant's statutory rights.<sup>130</sup> Given these requirements, mandatory arbitration agreements, executed as a condition of employment, should seldom be held valid and enforceable.

---

<sup>125</sup> Recall that *Gilmer* set out the following test to determine congressional intent behind the OWBPA: "If such an intention exists, it will be discoverable in the text of the ADEA, its legislative history, or an inherent conflict between arbitration and the ADEA's underlying purposes." 500 U.S. 20, 26 (1991).

<sup>126</sup> 29 U.S.C. § 626(f)(1)(1994).

<sup>127</sup> See *supra* note 83 and accompanying text.

<sup>128</sup> S. REP. NO. 101-263, at 31.

<sup>129</sup> *Id.* at 31–32.

<sup>130</sup> *Id.* The Senate Labor and Human Resources Committee expressly provided that "[t]he Committee expects that courts reviewing the 'knowing and voluntary' issue will scrutinize carefully the complete circumstances in which the waiver was executed." *Id.* at 32.

1. *Mandatory Arbitration Agreements Cannot Be Sustained as Satisfying the Knowing Requirement*

A waiver of a statutory right under the ADEA cannot be considered knowing unless it specifically refers to the right or claim to be waived and such waiver is not made on a prospective basis.<sup>131</sup> In general, mandatory arbitration agreements that arise as a condition of employment do not meet the statutory requirements mandated under § 626(f)(2)(B) and (C). In many cases, such waivers do not advise the employee that he is waiving his statutory right to a jury trial under the ADEA, nor are these waivers executed after the ADEA claim arises.<sup>132</sup>

In light of the fact that many older workers are not fully aware of their rights under the ADEA,<sup>133</sup> the use of mandatory arbitration agreements as a condition of employment have arguably become tools of manipulation and abuse. Employers can draft arbitration clauses without any reference to the ADEA right to a jury trial in an effort to avoid the high cost litigation that would result from allegations of age discrimination.<sup>134</sup> Employees, unaware of their statutory rights and the employer's underlying motives, will sign the

---

<sup>131</sup> 29 U.S.C. § 626(f)(1)(B), (C). The pertinent language of these sections provides:

(1) [A] waiver may not be considered knowing and voluntary unless at a minimum—

....

(B) the waiver specifically refers to rights or claims arising under this Chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed; . . .”

*Id.*

<sup>132</sup> See *Rosenberg*, 170 F.3d 1, 21 (1st Cir. 1999) (stating “had Merrill Lynch taken the modest effort required to make relevant information regarding the arbitrability of employment disputes available to Rosenberg . . . it would have been able to compel Rosenberg to arbitration.”); *Williams*, 56 F.3d at 661 (holding “[i]f we were to hold that an arbitration clause in a U-4 Registration had to comply with the OWBPA’s waiver provisions, we would in effect be holding that employers and employees could never enforce a pre-dispute agreement to arbitrate.”); *Thiele*, 59 F. Supp. 2d 1060, 1063 (1999) (finding that the U-4 Form waiver “did not specifically advise him that he was waiving his rights and claims under the ADEA, nor was that waiver executed after Thiele’s ADEA claim arose.”).

<sup>133</sup> H.R. REP. NO. 101-664, at 20 (1990) (recognizing that surveys have shown that most older workers do not know their rights under the ADEA).

<sup>134</sup> See McArthur, *supra* note 2, at 882 (stating that the legal fees alone to defend a civil rights discrimination suit can reach \$200,000. Typical jury awards often approach 1 million dollars after accounting for punitive damages).

agreement to arbitrate in order to secure their job.<sup>135</sup> Thus, the right to bring a court action is inevitably lost if an age discrimination claim later arises. The OWBPA was enacted to prevent this result.<sup>136</sup> It is now required that any arbitration clause specifically refer to the rights and claims the employee will be waiving.<sup>137</sup> If this essential information is excluded, the waiver will not be considered knowing and should be declared void.<sup>138</sup>

Similarly, a waiver will not be considered knowing if it purports to waive rights or claims that may arise after its execution.<sup>139</sup> This requirement attempts to prevent "unfair and abusive waiver practices."<sup>140</sup> Arbitration clauses required to be signed as a condition of employment attempt to preempt the statutory right to a jury trial *before a claim ever arises* to ensure the employer will not face litigation.<sup>141</sup> Because the agreement is executed as a condition of employment, the right to a jury trial is waived long before any potential or actual discrimination shows its face. This result is unjust.<sup>142</sup> Thus, the OWBPA prohibits any agreement that requires the waiver of a statutory right in advance of a dispute or claim.

## 2. Mandatory Arbitration Agreements Fail Again — The Voluntary Requirement

To be a valid and enforceable waiver, "[t]he individual [ ] must have acted in the absence of fraud, duress, coercion, or mistake of material fact."<sup>143</sup> When a mandatory arbitration agreement is required as a condition

---

<sup>135</sup> See *supra* note 107 and accompanying text.

<sup>136</sup> See *supra* note 101 and accompanying text.

<sup>137</sup> 29 U.S.C. § 626(f)(1)(B) (1994).

<sup>138</sup> See H.R. REP. NO. 101-664, at 20 (citing 133 Cong. Rec. S14383-84 (Oct. 15, 1987)) (concluding "[n]obody can knowingly waive his or her rights if he or she is unaware of what they involve.").

<sup>139</sup> 29 U.S.C. § 626(f)(1)(C).

<sup>140</sup> H.R. REP. NO. 101-664, at 22-23.

<sup>141</sup> See *supra* note 35 and accompanying text.

<sup>142</sup> S. REP. NO. 101-263, at 33 (stating "[i]t is a basic principle of fairness that employees should not be permitted to waive rights or claims on a prospective basis."). See also H.R. REP. NO. 101-664, at 23 (1990) (stating "[t]he preemptive waiver of rights occurs before a dispute has arisen and indeed before an employee is even aware of any potential or actual pattern of discrimination . . . . These waivers are both unfair and inconsistent with the intent of the ADEA.").

<sup>143</sup> S. REP. NO. 101-263, at 32.

## MANDATORY ARBITRATION AGREEMENTS

of employment, it is highly unlikely that the employee had a voluntary<sup>144</sup> choice in the matter. When an arbitration clause is included in an employment contract, the employee's agreement to sign is a prerequisite to securing the job position. Thus, such an agreement cannot be seen as voluntary. It is a "take-it-or-leave-it" situation.<sup>145</sup> An individual in need of a job will typically see no other alternative but to sign the agreement to arbitrate. As such, employees are more or less being coerced into signing mandatory arbitration agreements because securing the job depends on it. Thus, when employment is contingent on an agreement to arbitrate, it is difficult to conclude that the decision to comply was voluntary.

Mandatory arbitration agreements, when mandated as a condition of employment, cannot be sustained under the knowing and voluntary requirements of the ADEA, as amended by the OWBPA. Courts must scrutinize such agreements by examining the circumstances under which the waiver was executed.<sup>146</sup> Employees, of course, can knowingly and voluntarily decide to waive their right to a judicial forum after a dispute or claim has arisen.<sup>147</sup> However, such waivers are highly suspect when executed as a condition of employment and before a dispute or claim even exists.

### IV. THE OWBPA'S APPLICATION TO MANDATORY ARBITRATION AGREEMENTS

There has been some discussion in the courts regarding the scope of the OWBPA and whether Congress intended to extend its application to

---

<sup>144</sup> The term "voluntary" is defined as follows: "Unconstrained by interference; unimpelled by another's influence . . . . Proceeding from the free and unrestrained will of the person . . . . The word, especially in statutes, often implies knowledge of essential facts." BLACK'S LAW DICTIONARY 1575 (6th ed. 1990).

<sup>145</sup> *Duffield*, 144 F.3d 1182, 1199 (9th Cir. 1998) (commenting "[f]orm U-4 is a take-it-or-leave-it offer for anyone wishing to work anywhere in the United States as a broker-dealer in that industry. It forces individuals like Duffield to opt for one of two 'choices': sign Form U-4 or seek another profession.").

<sup>146</sup> See *supra* note 128 and accompanying text.

<sup>147</sup> See Motley, *supra* note 1, at 718 (stating "[p]ost-dispute agreements may make employees feel more involved in the process, and managers may be surprised that litigation claims actually decrease. Courts will likely enforce arbitration agreements created after the employee brings the claim against the employer and fully knows the consequences of the arbitration agreement."); see also *Development in the Law*, *supra* note 105, at 1671 n.8 (concluding that "[p]ost-dispute agreements are not controversial because they capture the benefits of arbitration, . . . without . . . the specter of coercion present in mandatory agreements.").

mandatory arbitration agreements of employment disputes. Some courts have declared that the OWBPA is concerned only with exit incentives and group termination programs, and thus has no effect on the enforceability of agreements to arbitrate employment disputes.<sup>148</sup> Other courts have held that the OWBPA does not contain such limiting language and that Congress did intend to extend the waiver requirements to mandatory arbitration agreements.<sup>149</sup>

The OWBPA's language does not support the argument that Congress was only concerned with exit incentives and other termination programs, and did not consider waivers that result from agreements to arbitrate employment disputes.<sup>150</sup> There is no limiting language to support this conclusion. Instead, the OWBPA speaks generally that *any waiver of any right or claim* under the ADEA must be knowing and voluntary.<sup>151</sup> The language does not specify that a waiver must only be in connection with exit incentives or group termination programs. It simply refers to a waiver in general. The statutory language further supports this conclusion. Section 626(f)(2) articulates the minimum requirements necessary for a waiver to be considered knowing and voluntary. However, the OWBPA expressly provides for further requirements when the waiver is requested in connection with exit incentives or other termination programs.<sup>152</sup> If the OWBPA was meant to apply solely to such programs, this language would be superfluous. Because older

---

<sup>148</sup> *Williams*, 56 F.3d at 660 (holding "[i]n enacting the OWBPA, Congress' primary concern was with releases and voluntary separation agreements in which employees were forced to waive their rights."); *Seus*, 146 F.3d at 181 (finding "Congress, through the OWBPA, has protected terminated employees who waive their substantive rights under ADEA in exchange for a more favorable severance package; however, we find no clear indication that Congress was likewise concerned with protecting employees who agree to arbitrate claims that may arise during the course of their employment.").

<sup>149</sup> *E.g., Thiele*, 59 F. Supp. 2d 1060, 1065 (S.D. Cal. 1999) (stating "[a]lthough Congress did express a concern for termination agreements, they did not limit the application of § 626(f) to such agreements.").

<sup>150</sup> Interview with James Brudney, Professor of Law at The Ohio State University in Columbus, Ohio (Jan. 12, 2000). James Brudney was involved in the OWBPA's enactment. When asked whether the OWBPA was concerned only with exit incentives and other termination programs, he responded that the language was written broadly for a reason. He explained that to have specifically extended the waiver requirements to mandatory arbitration agreements could have led to the demise of the bill. Instead, the language was written in general terms to not specifically prohibit these agreements, but to also not exclude them from OWBPA application. Although Brudney did admit the OWBPA focuses on waivers associated with exit incentives and termination programs, he also stated that this was not the only concern.

<sup>151</sup> 29 U.S.C. § 626(f)(1) (1994).

<sup>152</sup> 29 U.S.C. § 626(f)(1)(F)(ii)-(f)(1)(H) (1994).

## MANDATORY ARBITRATION AGREEMENTS

workers are just as likely to be coerced or manipulated into surrendering statutory rights when executing pre-dispute arbitration agreements as they are when executing arbitration agreements in connection with exit incentives and termination programs, the OWBPA should be interpreted to apply to all such waivers. Any other conclusion ignores congressional intent and the OWBPA's purpose.<sup>153</sup>

### V. CONCLUSION

The increased use of mandatory arbitration agreements as a condition of employment has no doubt been the result of many courts' over-extension and misapplication of the *Gilmer* decision. Employers have used such agreements to bypass guaranteed statutory rights in an effort to avoid the high cost litigation that results from discrimination in the workplace. In light of the increased risk that employees were unknowingly and involuntarily waiving statutory rights in order to secure a job position, Congress enacted the OWBPA to establish certain minimum requirements for a valid and enforceable waiver of such rights. The OWBPA requires that a waiver of any right or claim under the ADEA be knowing and voluntary. Employees of course can knowingly and voluntarily decide to waive their right to a judicial forum after a dispute or claim has arisen. However, such waivers are highly suspect when executed as a condition of employment and before a dispute or claim even exists.

As long as post-OWBPA ADEA courts continue to rely on *Gilmer's* pre-OWBPA ADEA reasoning as precedent, the purpose of the OWBPA will remain unfulfilled. Courts must acknowledge *Gilmer's* limitations and begin to apply the OWBPA as Congress intended. Until the Supreme Court or Congress communicate a different result, lower courts should hold that agreements to arbitrate, when mandated as a condition of employment, are inconsistent with the OWBPA's purpose and fail to meet the knowing and voluntary requirements of a valid waiver.

---

<sup>153</sup> The U.S. Supreme Court has addressed the applicability of the OWBPA to waivers included in a termination agreement. In *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, (1998), the Court concluded that the waiver could not bar the employee's ADEA claim because it did not comply with the knowing and voluntary requirements of the OWBPA. In reaching its decision, the Court held that the policy behind the OWBPA is clear: to protect the rights and benefits of older workers. As such, the Court found it was bound to take Congress at its word. *Id.* at 426-27. Although the Court did not discuss the OWBPA's application to mandatory arbitration agreements, its recognition and adherence to Congress' intent suggests that the Court would extend the OWBPA to protect the rights of older workers whenever ADEA rights are involved.

